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Speaking Notes for the Honourable Irwin Cotler, Reforms to the Judicial Appointments Process

Mr. Chair, Members of the Subcommittee:

I thank you for the opportunity to appear before your subcommittee.

If you had asked me about my priorities when I was first appointed Minister of Justice, I would not have included judicial appointments among them. But I have learned that this is a critical part of the administration of justice in this country. This is a legacy issue, and this will live on long after those of us who have the temporary stewardship of this position are no longer there.

Let me say that I truly believe that the current appointment process is sound in principle. This does not mean, however, that improvements cannot be made to the manner in which the current process operates in practice. As early as the Fall of 2004 – long before the events which gave rise to this subcommittee – I was suggesting publicly that we may want to examine the current process.

Before focusing on the description of the appointments process, allow me to emphasize the common ground that we share on this issue.

First and foremost, we agree on the importance of merit in making judicial appointments. Mr. Chair, you yourself stated in the House on June 3 that we need, and I quote, "[translation] to ensure that merit is the only consideration when people are appointed to the bench". Mr. McKay, in that same debate, noted that "We need the best minds, the best individuals and the most qualified persons comprising the bench at all levels."

I would agree wholeheartedly and only add that merit must be considered in light of the particular needs of the court at the time, as well as the important goal of ensuring our courts reflect the diversity of our country.

Second, we agree that our appointments system has been successful in ensuring excellence on the bench. My colleague Mr. Comartin pointed out to the House on June 3 of this year that, and again I quote, "we have an excellent judiciary in [this] country". Indeed, he suggested that "it may be the best in the world". I would certainly concur with this sentiment.

Any reform of the appointments process must ensure that we preserve this legacy of excellence. I do not agree with those who suggest that it is acceptable to sacrifice the quality of our judiciary in the name of improving the process. We have to keep our focus on the goal of having a top-drawer judiciary.

Third, and again I would regard this as a shared commitment, we need to protect the independence of the judiciary and the integrity of the institution.

Fourth, we agree – at least, I hope we agree – that any changes contemplated must be consistent with our constitutional framework. Section 96 of the *Constitution Act, 1867* is the governing provision in relation to judicial appointments to our superior courts. It gives the executive – or the federal Cabinet – the responsibility to appoint judges by order-in-council. In considering any reform of the federal appointments system, it is necessary to ask whether any proposed reforms

fit within the scope of section 96. There is no point trying to fit a square peg into the constitutional round hole.

I think we must be mindful of this in considering relative merits of appointment processes in other jurisdictions. While comparative analysis of other systems, including in the Canadian provinces and territories, can be of great value I would urge you to keep in mind that they may operate in different constitutional contexts.

Fifth, we would agree that yet, another shared objective is increased transparency and accountability.

Sixth, I think we also all share the view that any reforms to the appointments system must be workable in a practical sense. The system needs to be capable of efficiently processing the 500 or so applications that are received every year – with the 60 or so meetings that are required every year. It must recognize the geographically diverse and disperse nature of our country and in particular must be responsive to local needs and local expertise.

I have heard and read numerous suggestions – for example, that we can interview every candidate or have MPs on the appointments committees or have a process where short lists are established. I just caution you again to think of how some of these proposals will work in a practical sense, given the large number of applications that are made, the large number of jurisdictions we are dealing with and the large number of appointments that have to be made. We cannot end up with a process that looks nice on paper but is incapable of handling the applications submitted or filling the vacancies as they come up.

Seventh and finally, I think we all believe that a person's political affiliations should not be a prerequisite in choosing a candidate. Nor should it be used to exclude candidates. Mr. Chair, you yourself said on June 3 that "[translation] the fact that a person was previously involved in politics is no reason not to appoint him to the bench. On the contrary, we would be sending a very bad message if we told people they should do their civic duty by getting involved in politics, but that this will prevent them from being appointed to the bench." You went on to say, "[translation] political experience can often prove to be very useful, once a person becomes a judge".

Let me say that I agree with both of these sentiments. And, I have tried to apply them in practice when I decide who should be recommended for judicial appointment. I also want to stress that a candidate's political affiliation is not relevant to me when I make my decision.

May I turn now to a brief description of the appointments process. There are seven features that I want to highlight. The process is designed to ensure the Minister of Justice receives broadly based and objective advice about the qualifications of those who seek a judicial appointment.

First, the process is organized around independent judicial advisory committees which assess the qualifications of potential candidates. The committees are independent and at arm's length from the minister. There are 16 committees: three in Ontario, two in Quebec and one in each remaining province and territory.

Second, the Commissioner of Federal Judicial Affairs has responsibility for administering the appointments committees. He receives the applications and ensures assessments are done in an efficient and complete manner.

Third, committees include nominees of the judiciary, the Canadian Bar Association, the provincial law societies and the provincial attorneys general. All of these are independent, reputable entities. In addition, I select three members—two of whom must be laypersons. These nominees are intended to ensure there is a balance on the committee – be it for reasons of language, gender, regional representation or other diversity considerations. Some of you have asked why I should have three nominees on this committee. I would welcome your comments and recommendations

on this issue.

Fourth, judicial advisory committees vet applications from candidates in accordance with prescribed merit based criteria that are publicly available on the commissioner's website. The merit based criteria include general proficiency in the law, intellectual ability, analytical skills, ability to listen, ability to maintain an open mind, ability to make decisions, capacity to exercise sound judgment, reputation among professional peers and the general community, capacity to handle heavy workloads, capacity to handle stress and pressures of the isolation of the judicial role, awareness of racial and gender issues, bilingual ability and such personal characteristics as sense of ethics, patience, courtesy, honesty, common sense, tact, integrity, humility, fairness, reliability, tolerance, sense of responsibility and consideration for others.

Note that there is no reference to political affiliation or political belief. It is simply not considered relevant, nor can it be considered relevant.

Fifth, the committees assess candidates in one of three categories: recommended, highly recommended or unable to recommend. The files of all candidates are maintained in a separate and confidential data bank at the Commissioner's office.

Sixth, the Minister can only choose from candidates who are recommended or highly recommended. No candidate has ever been chosen who was not recommended by one of these committees.

Seventh, I subsequently engage in a consultative process to ensure I have the broadest possible information to determine who is the best candidate for a particular vacancy. For any given vacancy, I may consult with members of the judiciary, the Bar and with my provincial and territorial counterparts. I also welcome the advice of any group or individual on the considerations which should be taken into account when filling a vacancy. Following these consultations I make a recommendation to Cabinet. Appointments are then made by the Governor General acting on the advice of Cabinet.

Eight, the candidates' political affiliation, if any, is not a relevant criterion. It will not be a factor in the choice of a candidate, nor will it be a factor in the exclusion of a candidate.

I would now like to briefly address some of the criticisms that have been made of the current appointments process.

The first is that there is too much discretion in the hands of the Government. Mr. Chair, I believe this was one of your principal concerns when you addressed the House on June 3 – although you did acknowledge that you did not want ministerial discretion to be completely eliminated.

I would just want to remind the committee that the discretion arises from the application of section 96 of the Constitution. When you are thinking about your recommendations, you need to consider whether they will be consistent with section 96.

The second, and this flows somewhat from the first, is the Minister's power to appoint from the "recommended" as well as the "highly recommended" list. It is important to note that I do not have an open-ended discretion. I am limited to appointing from the list of recommended or highly recommended candidates. In addition, in my view there is a presumption in favour of appointing a candidate from the "highly recommended" list. However, there are occasions where diversity considerations or the requirements of the court in question may compel me to select from the "recommended" list instead. I do want to stress that candidates on the "recommended" list are still of superior quality.

The third criticism is that appointments are tainted by political considerations. Here, I can only speak to my own experience. And, I can say emphatically that this is not something I have ever

taken into account in developing my recommendations to Cabinet. Quite frankly, I couldn't care less.

In addition, the allegations that candidates who contributed to a political party of their choice were appointed to the bench are just that, allegations. Even if true, they only demonstrate a correlation, not a causative factor. Clearly, people should not be appointed because of such contributions, but they should not be discriminated against either, lest we begin to discourage participation in the political process.

While I believe that the current appointment is sound in principle, this does not mean that improvements cannot be made in practice. That is why I have sought the advice of the Chairs of the various provincial and territorial judicial advisory committees. It is these committees who have the experience on the ground in terms of how the process really operates in practice. I met with all the Chairs collectively in June. They provided me with some very valuable feedback and suggestions for concrete measures to enhance transparency and confidence in the process.

Further to those discussions, I have decided to take some initial steps in improving the process, both as it relates to transparency and other matters. I am releasing publicly today a Code of Ethics, which will provide clear professional direction to the members of the judicial appointments committees in relation to the exercise of their functions. The Code covers such matters as conflict of interest, communications with persons outside the committee and confidentiality.

Second, I am releasing publicly today the Guidelines that govern the advisory committee members' participation in the process. This will provide a better and more detailed appreciation of the way in which information with respect to the merit criteria is gathered and assessed by the Committee members. It will also demonstrate the careful steps that are taken to preserve confidentiality, which is central to the process.

Third, I am releasing publicly today the mandate letter that is provided to advisory committee members once they agree to participate in the committee process.

Fourth, I have recently asked the Commissioner for Federal Judicial Affairs to publish, on an annual basis two important sets of information. The first is a current list of the members of the Judicial Appointments Committees. The second is information about applications for judicial office, including the total number of applications as well as the number of candidates who are recommended and highly recommended.

All of the above information will be made available on the Commissioner's web site.

I strongly believe that the measures I have announced today will improve public understanding of the strengths of the judicial appointments committee process and do much to dispel the unfounded innuendo and criticism that have been increasingly directed towards judges in the past number of months.

Before concluding, Mr. Chair and members of the sub-committee, I believe it is our role as Parliamentarians to engage in respectful and constructive debate on the challenges we face – not to engage in careless and casual condemnation of the judiciary which does nothing to enhance public trust in this vital institution.

Accordingly, I want to stress that I have become quite concerned over the past year about the politicized critiques of the judiciary to score what I consider to be cheap political points. The judiciary is an extremely important public institution – one which is fundamental to the operation of our democracy. It is also an institution which depends to a large degree on public trust and confidence.

Canadians have every right to be proud of our judicial system, which is studied around the world

as a model of fairness, impartiality and independence. One of the main reasons for this is that Canadian judges are of the highest calibre. They are diligent and dedicated, and they deservedly enjoy a high degree of respect and admiration both within Canada and beyond our borders.

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